NAUTICAL SUPREME SDN BHD v. JAYA SUDHIR JAYARAM & ORS

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
SURAYA OTHMAN JCA
STEPHEN CHUNG JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-2296-11-2017]
17 JANUARY 2019
[2019] CLJ JT(3)

CIVIL PROCEDURE: *Injunction – Injunction to restrain arbitration proceedings – White knight invested in project based on alleged collateral understanding with shareholders that shares in joint venture company would be held on trust in his favour – Part of shares transferred to white knight – Allegation that transfer of shares in contravention of shareholders' agreement – Shareholders and joint venture company proceeded with arbitration to resolve dispute in accordance with arbitration clause in shareholders' agreement – White knight applied for injunction to restrain arbitration proceedings – Whether non-party to arbitration agreement could restrain parties to arbitration agreement from continuing with arbitration proceedings – Test applicable to non-party – Arbitration Act 2005, s. 10(1) & (3)*

ARBITRATION: *Proceedings – Injunction to restrain arbitration proceedings – White knight invested in project based on alleged collateral understanding with shareholders that shares in joint venture company would be held on trust in his favour – Part of shares transferred to white knight – Allegation that transfer of shares in contravention of shareholders' agreement – Shareholders and joint venture company proceeded with arbitration to resolve dispute in accordance with arbitration clause in shareholders' agreement – White knight applied for injunction to restrain arbitration proceedings – Whether non-party to arbitration agreement could restrain parties to arbitration agreement from continuing with arbitration proceedings – Test applicable to non-party – Arbitration Act 2005, s. 10(1) & (3)*

Nautilus Tug & Towage Sdn Bhd, the third respondent ('the fourth defendant'), was a joint venture company which was formed to provide harbour tug services for Vale Malaysia Minerals Sdn Bhd ('VMM') ('the project'). Nautical Supreme Sdn Bhd ('the second defendant') and Azimuth Marine Sdn Bhd, the second respondent ('the third defendant'), were the shareholders of the fourth defendant. The fourth defendant was in need of funds to carry out the project and according to the first respondent ('the plaintiff'), he played the role of a 'white knight' when he agreed to invest in the project, based on a 'collateral understanding' between himself and the second and third defendants that (i) the third defendant would hold 80% of shares in the fourth defendant where part of the shares would be held on trust for the plaintiff; (ii) the plaintiff would be entitled to participate in the fourth defendant's equity, either directly or through the third defendant's

A shareholding; and (iii) the second defendant agrees to the plaintiff's participation in the fourth defendant's equity and no further consent was required for the third defendant's divestment of any part of its shares to the fourth defendant. The plaintiff averred that Dato' Seri Timor Shah Rafiq ('the first defendant') negotiated the terms on behalf of the second defendant. B The second to fourth defendants later entered into a shareholders' agreement and subsequently, the fourth defendant entered into an agreement with VMM to carry out the project. According to the plaintiff, (i) he participated in the business of the fourth defendant in respect of the project; (ii) the first and second defendants acknowledged his beneficial ownership of part of 80% of C the fourth defendant's shares held in the name of the third defendant; and (iii) 10% of the fourth defendant's shares held in the third defendant's name was transferred to him without any objection. However, the first and second defendants disagreed with the plaintiff's contentions and, in denying the existence of any collateral understanding, the first and second defendants submitted that the transfer of such shares was in contravention of the D shareholders' agreement. This led to the second defendant issuing a notice of breach ('the notice') against the third and fourth defendants. Pursuant to the notice, the second defendant commenced arbitration proceedings against the third and fourth defendants, in accordance with the arbitration clause in the shareholders' agreement. Believing that the notice was in breach of the E collateral understanding, the plaintiff applied to the High Court for an injunction to restrain the second defendant from continuing the arbitration proceedings against the third and fourth defendants. In granting the injunction, the High Court Judge ('HCJ') applied the test stipulated in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah* ('the *Keet Gerald* F *Francis* test'). Hence, the present appeal by the second defendant. The novel issue that arose for adjudication was whether the plaintiff, who was not a party to the arbitration agreement, could restrain the second to fourth defendants, who were parties to the arbitration agreement, from continuing with arbitration proceedings.

G **Held (allowing appeal; setting aside decision of High Court)**
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) The HCJ made a finding that s. 10(1) and (3) of the Arbitration Act 2005 ('the Act') were not applicable to the plaintiff's application to restrain arbitration proceedings on the premise that the plaintiff was not a party H to the shareholders' agreement and consequently, not a party to the arbitration proceedings. From a plain reading, it would appear that the 'party' and 'parties' referred to in s. 10(1) of the Act are necessarily parties to arbitration. Thus, where parties have elected to resolve disputes by arbitration, rather than the court, the courts, on the premise I of respect for party autonomy and a non-interventionist policy underlying the Act, will refer the parties to arbitration unless 'it finds

that the agreement is null and void, inoperative or incapable of being performed'. While it would seem that the provisions do not apply to persons who are non-parties to arbitration proceedings, it did not mean that the plaintiff, a non-party, was at liberty to derail pending arbitration proceedings on the premise that the Act did not apply to him. To do so would allow a non-party to circumvent and undermine the objective of the Act. (paras 38-40)

(2) Where there are pending arbitration proceedings, as in this case, the courts should have due regard to the Act and take cognisance of pending arbitration proceedings. It was incorrect to say that the Act did not apply to the plaintiff. The HCJ erred in not giving due consideration to the pending arbitration between the second to fourth defendants and the objective of the Act. The HCJ erred in law in His Lordship's finding that since the plaintiff was a non-party, the Act did not apply to his application. Furthermore, the HCJ made no finding on the nullity of the relevant agreement to justify the injunction to restrain arbitration proceedings. (paras 40 & 43)

(3) On the authority of *J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited* ('the *Jarvis* test'), any discretion to grant injunctions against arbitration must be exercised sparingly and with due regard to any pending arbitration and the objectives and principles of the Act. In addition to that, the application must satisfy the two conditions stipulated, in that, 'the injunction does not cause injustice to the claimant in the arbitration and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process'. Under the *Jarvis* test, inordinate delay was a material factor and could be fatal to an application for an injunction. The second defendant issued to the third and fourth defendants the notice to refer the disputes to arbitration dated 19 October 2016. A copy of the said notice was extended to the plaintiff and he only filed an application for an injunction to restrain the arbitration proceedings on 29 August 2017. This meant that the plaintiff filed the injunction to restrain the arbitration proceedings almost ten months after he became aware of it. By this time, the parties in the arbitration proceedings were conducting discovery of documents in preparation for the hearing scheduled to commence on 1 November 2017. There was no reasonable explanation provided by the plaintiff that justified the delay of ten months. (paras 50, 51 & 68)

(4) The *Keet Gerald Francis* test was a general test for the granting of interim injunctions. It had no application on the facts and circumstances of this case, which was the subject matter of arbitration proceedings and, therefore, subject to the clear and express provisions of the Act. The *Keet Gerald Francis* test only applies as an interim measure to preserve the *status quo* between parties to a dispute pending the trial of the 'serious

issues' between the parties for a final and permanent resolution. Such a rationale had no application in this case where the parties in the arbitration proceedings were different from the parties in the suits before the court. Therefore, the HCJ erred in using the *Keet Gerald Francis* test, instead of the *Jarvis* test, in allowing the plaintiff's application to restrain the arbitration proceedings. (paras 60-62)

***Bahasa Malaysia** Headnotes*

Nautilus Tug & Towage Sdn Bhd, responden ketiga ('defendan keempat') ialah syarikat usaha sama yang ditubuhkan untuk menyediakan perkhidmatan kapal tunda labuhan buat Vale Malaysia Minerals Sdn Bhd ('VMM') ('projek'). Nautical Supreme Sdn Bhd ('defendan kedua') dan Azimuth Marine Sdn Bhd, responden kedua ('defendan ketiga'), adalah pemegang saham defendan keempat. Defendan keempat memerlukan dana untuk menjalankan projek tersebut dan menurut responden pertama ('plaintif'), dia memainkan peranan sebagai 'wira penyelamat' apabila dia bersetuju untuk melabur dalam projek tersebut, berdasarkan satu 'persefahaman kolateral' antara dirinya dengan defendan kedua dan ketiga bahawa (i) defendan ketiga akan memegang 80% saham dalam defendan keempat dan sebahagian saham tersebut dipegang sebagai amanah buat plaintif; (ii) plaintif berhak mengambil bahagian dalam ekuiti defendan keempat, sama ada secara langsung atau melalui pegangan saham defendan ketiga; dan (iii) defendan ketiga bersetuju dengan pengambilan bahagian plaintif dalam ekuiti defendan keempat dan tiada kebenaran lanjut yang diperlukan untuk pembahagian mana-mana bahagian saham defendan ketiga untuk defendan keempat. Plaintif menegaskan Dato' Seri Timor Shah Rafiq ('defendan pertama') berunding tentang terma-terma tersebut bagi pihak defendan kedua. Defendan kedua hingga keempat seterusnya memeterai perjanjian pemegang saham dan susulan itu, defendan keempat memeterai perjanjian dengan VMM untuk melaksanakan projek tersebut. Menurut plaintif, (i) dia mengambil bahagian dalam perniagaan defendan keempat bersangkutan projek tersebut; (ii) defendan pertama dan kedua mengakui milikan benefisialnya sebahagian daripada 80% saham dalam defendan keempat yang dipegang atas nama defendan ketiga; dan (iii) 10% daripada saham defendan keempat dipegang atas nama defendan ketiga dipindah milik padanya tanpa apa-apa bantahan. Walau bagaimanapun, defendan pertama dan kedua tidak bersetuju dengan hujahan plaintif dan, dalam menolak kewujudan apa-apa persefahaman kolateral, defendan pertama dan kedua menyatakan pindah milik saham tersebut melanggar perjanjian pemegang saham. Ini mendorong defendan kedua mengeluarkan satu notis pelanggaran ('notis') terhadap defendan ketiga dan keempat. Berikutan notis ini, defendan kedua memulakan prosiding timbang tara terhadap defendan ketiga dan keempat, selaras dengan klausa timbang tara dalam perjanjian pemegang saham. Berpendirian bahawa notis tersebut melanggar persefahaman kolateral, plaintif memohon, di Mahkamah Tinggi, satu injunksi

menghalang defendan kedua daripada meneruskan prosiding timbang tara terhadap defendan ketiga dan keempat. Membenarkan injunksi tersebut, Hakim Mahkamah Tinggi ('HMT') mengguna pakai ujian yang dinyatakan dalam *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah* ('ujian *Keet Gerald Francis*'). Maka timbul rayuan ini oleh defendan kedua. Isu tidak berduluan yang timbul untuk diputuskan ialah sama ada plaintif, seorang yang bukan pihak dalam perjanjian timbang tara, boleh menghalang defendan kedua hingga keempat, iaitu pihak-pihak dalam perjanjian timbang tara, meneruskan prosiding timbang tara.

Diputuskan (membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Hakim Mahkamah Tinggi membuat dapatan bahawa s. 10(1) dan (3) Akta Timbang Tara 2005 ('Akta') tidak terpakai pada permohonan plaintif untuk menghalang prosiding timbang tara, atas alasan plaintif bukan pihak dalam perjanjian pemegang saham dan susulan itu, bukan pihak dalam prosiding timbang tara. Berdasarkan bacaan biasa, kelihatan seperti 'pihak' dan 'pihak-pihak' yang dirujuk dalam s. 10(1) Akta semestinya pihak-pihak dalam timbang tara. Oleh itu, apabila pihak-pihak memilih untuk menyelesaikan pertikaian melalui timbang tara, dan bukan mahkamah, mahkamah-mahkamah, atas dasar menghormati pihak autonomi dan polisi tidak campur tangan yang menjadi dasar Akta, akan merujuk pihak-pihak dalam timbang tara kecuali 'jika mahkamah itu mendapati bahawa perjanjian itu adalah batal dan tidak sah, tidak berkuat kuasa atau tidak dapat dilaksanakan'. Walaupun kelihatan bahawa peruntukan-peruntukan tersebut tidak terpakai pada mana-mana orang yang bukan pihak dalam prosiding timbang tara, tidak bermaksud plaintif, seorang yang bukan pihak, bebas menghalang prosiding timbang tara yang belum selesai atas alasan Akta tidak terpakai padanya. Berbuat sedemikian akan membenarkan seseorang yang bukan pihak memintas dan melemahkan objektif Akta.

(2) Apabila terdapat prosiding timbang tara yang belum selesai, seperti dalam kes ini, mahkamah harus mempertimbangkan Akta dan mengambil perhatian tentang prosiding timbang tara. Tidak betul untuk mengatakan Akta tidak terpakai pada plaintif. Hakim Mahkamah Tinggi terkhilaf apabila tidak memberi pertimbangan wajar pada timbang tara yang belum selesai antara defendan kedua hingga keempat dan juga objektif Akta. Hakim Mahkamah Tinggi terkhilaf, bawah undang-undang, dalam dapatan beliau bahawa, oleh kerana plaintif bukan pihak, Akta tidak terpakai pada permohonannya. Tambahan lagi, HMT tidak membuat dapatan tentang pembatalan perjanjian relevan untuk mewajarkan injunksi untuk menghalang prosiding timbang tara.

(3) Berdasarkan autoriti *J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited* ('ujian *Jarvis*'), apa-apa bidang kuasa untuk memberi injunksi terhadap timbang tara mesti dijalankan dengan berhati-hati, mengambil perhatian pada mana-mana timbang tara yang belum selesai serta objektif dan prinsip-prinsip Akta. Tambahan lagi, pemakaiannya mesti memenuhi dua syarat yang dinyatakan iaitu 'injunksi tidak menyebabkan ketidakadilan pada pihak yang menuntut dalam timbang tara dan penerusan timbang tara akan menindas, bersifat remeh, tidak munasabah dan satu salah guna proses'. Menurut ujian *Jarvis*, kelengahan terlampau adalah faktor material dan boleh menjejaskan permohonan injunksi. Defendan kedua mengeluarkan notis merujuk pertikaian pada timbang tara, kepada defendan ketiga dan keempat, bertarikh 19 Oktober 2016. Sesalinan notis tersebut diserahkan kepada plaintif dan dia memfailkan permohonan injunksi untuk menghalang timbang tara tersebut pada 29 Ogos 2017. Ini bermaksud plaintif memfailkan injunksi untuk menghalang prosiding timbang tara tersebut hampir sepuluh bulan selepas dia mengetahui tentangnya. Ketika itu, pihak-pihak dalam prosiding timbang tara sedang menjalankan penzahiran dokumen-dokumen sebagai persediaan perbicaraan yang dijadualkan bermula pada 1 November 2017. Tiada penjelasan munasabah yang dikemukakan oleh plaintif yang mewajarkan kelewatan selama sepuluh bulan.

(4) Ujian *Keet Gerald Francis* ialah ujian am untuk membenarkan injunksi interim. Ini tidak terpakai pada fakta dan hal keadaan kes ini, yang menjadi hal perkara prosiding timbang tara dan, dengan itu, tertakluk pada peruntukan jelas dan nyata Akta. Ujian *Keet Gerald Francis* hanya terpakai sebagai langkah sementara untuk mengekalkan *status quo* antara pihak-pihak yang bertikai sebelum perbicaraan selesai tentang 'isu-isu serius' antara pihak-pihak untuk mencapai keputusan yang muktamad dan kekal. Rasional sedemikian tidak terpakai dalam kes ini yang pihak-pihak dalam prosiding timbang tara berbeza dengan pihak-pihak dalam guaman-guaman di mahkamah. Oleh itu, HMT terkhilaf apabila mengguna pakai ujian *Keet Gerald Francis*, dan bukan ujian *Jarvis*, dalam membenarkan permohonan plaintif untuk menghalang prosiding timbang tara.

Case(s) referred to:

Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd [2002] 1 CLJ 433 CA ***(not foll)***

Chase Perdana Bhd v. Pekeliling Triangle Sdn Bhd & Anor [2008] 1 CLJ 313 FC ***(refd)***

Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd [2015] 4 CLJ 561 ***(refd)***

J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited [2007] EWHC 1262 (TCC) ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(dist)***

Lin Ming v. Chen Shu Quan [2012] 2 HKLRD 547 ***(refd)***
Montgomery Watson NZ Limited v. Milburn NZ Limited Cp 86/00 ***(refd)***
Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd [2016] 9 CLJ 1 FC ***(refd)***
Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 SC ***(refd)***
The "Oranie" and the "Tunisie" [1966] 1 Lloyd's Rep 477 ***(refd)***
Tomulugen Holdings Ltd And Another v. Silica Investors Ltd And Other Appeals [2015] SGCA 57 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 8, 10(1), (3)

Arbitration Act 1996 [UK], s. 9

For the appellant - Su Tiang Joo, KL Pang, Teh Eng Lay, Chok Zhin Theng, Nicholas Teh; M/s Cheah Teh & Su
For the 1st respondent - Gopal Sri Ram, Robert Low, David Yii, Karen Yong, Chong Lip Yi, Khong Mei Yan & Damien Chan; M/s Ranjit Ooi & Robert Low
For the 2nd respondent - Lim Tuck Sun & Kenneth Koh; M/s Chooi & Company + Cheang & Ariff
For the 3rd respondent - David Mathews, Olivia Loh & Malarvily Perumal; M/s Gananathan Loh

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: WA-22NCC-165-05-2017 (overruled).]

Reported by Najib Tamby

JUDGMENT

Badariah Sahamid JCA:

[1] This appeal before us is against the decision of the KL High Court on 6 November 2017 in suit No. WA-22 NCC 165-05-2017 in which the High Court had granted the plaintiff's application in encl. 7 for an injunction to restrain the second defendant from continuing arbitration proceedings commenced by the second defendant against the third and fourth defendants.

[2] For ease of reference, parties will be referred to as they were in proceedings before the High Court.

Issue

[3] The issue for determination before the High Court was whether the plaintiff, who is not a party to the arbitration agreement can restrain the second, third and fourth defendants who were parties to the arbitration agreement from continuing with arbitration proceedings?

Background Facts

[4] The facts are derived from the learned judge's 'judgment' with necessary modifications.

[5] The fourth defendant is a joint venture company. The second and third defendants were the initial shareholders, with the second defendant holding 20% shares and the third defendant holding 80% shares.

"Collateral Understanding"

[6] The fourth defendant was formed to undertake a project for the provision of harbour tug services for a company called Vale Malaysia Minerals Sdn Bhd ('Vale'). The fourth defendant was in need of funds to carry out the project. The plaintiff's contention is that he had played the role of a "white knight" when he agreed to invest in the above-mentioned project premised on a "collateral understanding" between himself, the second and the third defendants.

[7] The plaintiff claims that pursuant to the collateral understanding, the terms agreed were as follows:

(i) The third defendant would hold 80% shares in the fourth defendant, where part of the shares will be held on trust for the plaintiff;

(ii) The plaintiff would be entitled to participate in the fourth defendant's equity, either directly or through the third defendant's shareholding; and

(iii) The second defendant agrees to the plaintiff's participation in the fourth defendant's equity, and no further consent was required for the third defendant's divestment of any part of its shares to the fourth defendant.

[8] The plaintiff contended that the first defendant was aware of the collateral understanding as he had negotiated the above-mentioned terms on behalf of the second defendant.

[9] On 15 March 2013, a shareholders' agreement was entered into between the second, third and fourth defendants. Subsequently, the fourth defendant entered into a 'harbour tug services agreement' with Vale dated 11 April 2013.

[10] The plaintiff contended that premised on the collateral understanding, he had participated in the business of the fourth defendant in respect of the project. He further contended that the first and second defendants had acknowledged his beneficial ownership of part of the 80% of the fourth defendant's shares held in the name of the third defendant.

[11] In addition, the plaintiff claimed that 10% of the fourth defendant's shares held in the third defendant's name was transferred to him on 16 December 2015. There was no objection to the transfer from the second defendant and the business of the fourth defendant carried on as usual.

[12] However, the first and second defendants disagreed with the plaintiff's contention. They denied the existence of any collateral understanding. They were also aggrieved with the transfer of shares to the plaintiff and alleged that such transfer was in contravention of the terms and conditions of the shareholders' agreement.

[13] This led to the second defendant issuing a notice of breach dated 1 July 2016 against the third and the fourth defendants. The plaintiff contended that the second defendant's notice was in breach of the collateral understanding.

Arbitration Proceedings

[14] Pursuant to the notice of breach, the second defendant commenced arbitration proceedings against the third and the fourth defendants pursuant to the arbitration clause in the shareholders' agreement. This was conducted in the Kuala Lumpur Regional Centre for Arbitration. The ambit of the arbitration clause is not in issue in this matter.

[15] The reliefs sought by the second defendant in the arbitration proceedings were as follows:

(i) A declaration that the transfer of the fourth defendant's 10% shares to the plaintiff was in breach of the shareholders' agreement;

(ii) An order that the second defendant is entitled to purchase the 10% transferred shares of the fourth defendant; and

(iii) An order that the second defendant is entitled to purchase the third defendant's remaining 70% shares in the fourth defendant.

Civil Suits at High Court

[16] In addition, the second defendant proceeded to commence three civil suits in the Kuala Lumpur High Court ('KLHC') as follows:

(a) KLHC Originating Summons No. WA-24 NCC-280-07-2016 ('OS 280 suit')

The second defendant's application for an injunction to restrain the third defendant from disposing or dealing with its 70% shares in the third defendant as well as its 10% shares held in the plaintiff's name, pending the disposal of arbitration proceedings.

(b) KLHC Originating Summons No. WA-24 NCC (ARB)-9-02-2016 ('OS 9 suit')

The second defendant's application for an injunction to restrain the fourth defendant from proceeding with an extraordinary general meeting fixed on 23 February 2017, to amongst others, remove the first defendant from the fourth defendant's board of directors.

(c) KLHC Suit No. WA-22 NCvc-544-08-2016 ('the tort suit')

The second defendant's suit against the plaintiff premised on the tort of inducement, to claim damages from the plaintiff for *inter alia* inducing the third and fourth defendants to breach the shareholders' agreement.

[17] Meanwhile, the arbitration proceedings commenced by the second defendant against the third and fourth defendants had reached an advanced stage and was scheduled for hearing before the arbitrator from 1 to 8 November 2017 and on 27 November 2017.

Injunction Application Before The High Court

[18] The plaintiff's application for an injunction is premised on the collateral understanding between the plaintiff, the second, third and the fourth defendants and the alleged breach of the same by the second defendant.

Second Defendant's Submissions

[19] The second defendant's grounds to oppose the plaintiff's application for an injunction to restrain arbitration proceedings may be summarised as follows:

(i) The plaintiff is estopped from opposing the arbitration proceedings on account of the plaintiff's pleaded defence in the tort suit that the issue in respect of the share transfer is subject to arbitration. The plaintiff's pleaded defence amounted to judicial admissions;

(ii) The third and fourth defendants have consented to the plaintiff's application as they were parties to the transfer of the third defendant's shares in the fourth defendant to the plaintiff. However, the third and fourth defendants have by their conduct, submitted to arbitration proceedings. Thus they are estopped from taking a contradictory position that the disputes should be resolved by the courts;

(iii) The plaintiff is guilty of inordinate delay of nearly ten months after he became aware of the arbitration proceedings and the tort suit in filing this application;

(iv) The plaintiff's injunction application to restrain arbitration proceedings, to which the third and fourth defendants are complicit, is a tactical manoeuvre to scuttle the hearing of the arbitration proceedings;

(v) The plaintiff has not satisfied the test for an anti-arbitration injunction under s. 10(1) and (3) of the Arbitration Act 2005 and the English case of *J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited* [2007] EWHC 1262 (TCC);

(vi) The test in the case of *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & Ors* [1995] 1 CLJ 293 (CA) is the general test for an interlocutory injunction and is not applicable to this case, which is an injunction to restrain arbitration proceedings;

(vii) The second defendant has incurred substantial costs in the arbitration proceedings.

Findings and Decision of the High Court

[20] On 6 November 2017, the High Court allowed the plaintiff's application for an injunction to restrain the second defendant from continuing arbitration proceedings commenced by the second defendant against the third and fourth defendants. The reasons given by the learned High Court Judge on the issues raised by the second defendant may be summarised as follows.

Judicial Admissions

[21] The plaintiff's pleaded defence in the tort suit that the second, third and fourth defendants are subjected to arbitration proceedings by virtue of the shareholders' agreement, "did not amount to a concession by the plaintiff that the share transfer issue could only be resolved by way of arbitration. The plaintiff was clearly not a contracting party to the shareholders' agreement. He is as such not governed by its terms and conditions. The foundation of his claim is not with the shareholders' agreement but with what he alleged as the collateral understanding. As the plaintiff was not a party to the shareholders' agreement, he could not seek recourse through the arbitration proceedings. He could only ventilate his claim through this suit."

The Third And Fourth Defendants' Consent To The Plaintiff's Application

[22] The consent of the third and fourth defendant is not a relevant factor as the plaintiff's application must be considered on its own merits. The plaintiff had correctly named the third and fourth defendants in this suit as they are parties to the shareholders' agreement.

Inordinate Delay

[23] There was no inordinate delay on the part of the plaintiff. The chronology of events stated by the plaintiff in his affidavit justified his application at the material time. "Although the plaintiff was candid with the fact that there was no agreement for parties to keep their dispute in abeyance, I accept the plaintiff's explanation that he had withheld any action to avoid aggravating the situation. It was only reasonable that the plaintiff would need some time to arrange and make a reasoned decision on the approach that he would need to take."

Tactical Manoeuvre

[24] The injunction sought by the plaintiff is not a tactical ploy to scuttle the hearing of the arbitration, but was the plaintiff's bid to preserve his claim over the shares.

Test For Anti-Arbitration Injunction

[25] The plaintiff is not a party to the shareholders' agreement. Consequentially, he is not and cannot be made a party to the arbitration proceedings. Thus, the provisions referred to in the Arbitration Act 2005, in particular, s. 10(1) and (3) of the Act are not applicable to the plaintiff's application. On the same premise, the test in *Jarvis* and *Lin Ming* was also not applicable to the plaintiff's application as the parties in those cases were the subject of the relevant arbitration agreements.

[26] The more relevant authority is the case of *Bina Jati Sdn Bhd v. Sum-Projects (Brothers) Sdn Bhd* [2002] 1 CLJ 433; [2002] 2 MLJ 71 (CA) which decided that, "where some are parties and others are not parties to the arbitration it is best that their disputes be dealt with by the court". *Bina Jati* was cited with approval by the Federal Court in *Chase Perdana Bhd v. Pekeliling Triangle Sdn Bhd & Anor* [2008] 1 CLJ 313; [2007] 7 MLJ 677.

[27] Where the right of a non-party to arbitration proceedings is involved, the primary consideration on whether to grant an injunction to restrain arbitration proceedings is what would be the fairest approach to all parties. Priority should be given for the matter to be dealt with by the courts so that the party who cannot participate in the arbitration proceedings "would not be left out in the cold". Thus all the relevant parties can participate in court proceedings.

The Keet Gerald Francis Test

[28] The test set out in *Keet Gerald Francis* is pertinent to the plaintiff's application. The plaintiff has satisfied the criteria laid down. The plaintiff's contention of the existence of a "collateral understanding", as well as the plaintiff's role and participation in the Vale project are amongst the serious issues that merit a trial. In addition, damages would not be an adequate remedy as the shares of the relevant company "is not readily available on the market". The balance of convenience is also in favour of the plaintiff to avoid multiplicity of proceedings and the potential for inconsistent findings between the court and the arbitrator:

> Unlike the arbitration proceedings, all parties involved in the issue of the third and fourth defendants' shares are in this suit. The issues raised in the arbitration proceedings clearly overlaps with the issues in this suit. It would be most unfortunate if this suit and the arbitration proceedings were to run concurrently, as there is a possibility that the outcome in the arbitration proceeding and this suit conflicts with each other.

[29] Thus, the learned High Court Judge was of the view that the plaintiff has shown merits in his application to restrain the second, third and fourth defendants from continuing with arbitration proceedings.

Second Defendant's Grounds Of Appeal

[30] In his memorandum of appeal, the second defendant has listed ten grounds of appeal wherein the learned High Court Judge had erred. These may be summarised as follows:

(i) The plaintiff is bound by his judicial admissions in an earlier court proceedings that the disputes between himself, the second and third defendants ought to be arbitrated in arbitration proceedings. Thus, the plaintiff is estopped from taking a contrary position to restrain arbitration proceedings.

(ii) The position taken by the third and fourth defendants in not objecting to the injunction application to restrain arbitration proceedings is not a ground to allow the injunction application against the third and fourth defendants.

(iii) The plaintiff is guilty of inordinate delay in making the injunction application, which delay is fatal to his application.

(iv) The plaintiff's injunction application is a tactical manoeuvre by the plaintiff, assisted by the third and fourth defendants to subvert the arbitration agreement between the second and third defendants, and to circumvent the provisions of the Arbitration Act 2005 and scuttle arbitration proceedings.

(v) The learned judge had failed to apply the correct test to grant an injunction against arbitration as stipulated under the Arbitration Act 2005.

(vi) The plaintiff had failed to satisfy the test to be granted an injunction against arbitration under the Arbitration Act 2005.

(vii) The relief prayed for in the plaintiff's application for an injunction against arbitration is for a final and permanent injunction, not merely an interlocutory injunction.

(viii) Any award made in the arbitration proceedings is not binding on the plaintiff, who is not a party to the arbitration proceedings.

(ix) The purported collateral understanding has no basis and is an afterthought of the plaintiff.

(x) Although the third and fourth defendants are named in the injunction application, the disputes between the third and the fourth defendants against the second defendant are governed by an arbitration agreement and ought not to be litigated in this injunction application.

Our Judgment

[31] After careful consideration of learned counsels' oral as well as written submissions, the appeal records as well as legal authorities, we are of the unanimous view that there are merits in this appeal that warrant appellate intervention. We therefore allow this appeal with costs and set aside the decision of the learned High Court Judge. We set out below our reasons.

[32] At the outset, we note that the facts and circumstances of this case are peculiar, in that it raises a novel issue that counsel assure us have not been conclusively determined by any legal precedent or authority that they are aware of. The peculiar fact is that the plaintiff, who is not a party to arbitration proceedings has sought an injunction to restrain arbitration proceedings against the second, third and fourth defendants who are parties to pending arbitration proceedings.

[33] It is useful to summarise the primary issues raised by the appeal before us as follows:

(i) Does s. 10(1) and (3) of the 2005 Act apply to parties who are not parties to arbitration proceedings?

(ii) Can a person who is not a party to arbitration proceedings, restrain arbitration proceeding? What is the test applicable to the non-party? Is it the test set out in the *Jarvis*'s case or the test enunciated in *Keet Gerald Francis*?

(iii) Should the test to restrain arbitration proceedings be less stringent as against non-parties to arbitration proceedings than as against persons who are parties to arbitration proceedings?

Applicability Of s. 10(1) And (3) Of The 2005 Act To Non-parties To Arbitration Proceedings

[34] The Arbitration Act 2005 ('2005 Act') came into force on 15 March 2005. The 2005 Act was modelled extensively on the UNCITRAL Model Law on International Commercial Arbitration ('UNCITRAL Model Law') but drafted based on the New Zealand Arbitration Act 1996. Previously, arbitration proceedings were governed by the Arbitration Act 1952 ('the 1952 Act').

[35] The shift from the 1952 Act to the 2005 Act signals a clear shift to a position of respect for party autonomy and a non-interventionist policy of the courts once the requirements in the Act have been satisfied. Ramly Ali FCJ in the case of *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1, (Federal Court) at p. 18 para. 36 had enunciated the objective of the 2005 Act as follows:

As stated in the explanatory statement to the Arbitration (Amendment) Bill 2010, (which later was passed as the 2011 Amendment), the purpose of this provision is "to limit court intervention to situations specifically covered by the Arbitration Act and to discourage the use of inherent powers of the court".

[36] Section 10(1) of the 2005 Act provides as follows:

10. Arbitration agreement and substantive claim before court.

(1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2)

(2A) …

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[37] In *Press Metals* case, at p. 32, para. 98, Ramly Ali FCJ had observed as follows:

... under s. 10 of our 2005 Act, it is mandatory for the court to make such a stay order once the requirements in the section are fulfilled.

It is clear therefore from a reading of the 2005 Act and the authorities cited, that while the 2005 Act does not have the effect of ousting the jurisdiction of the court to grant an injunction to restrain an arbitration or continuance of an arbitration, the exercise of the court's discretion will now be more sparing than before.

[38] The learned High Court Judge had made a finding that s. 10(1) and (3) of the 2005 Act are not applicable to the plaintiff's application to restrain arbitration proceedings on the premise that the plaintiff is not a party to the shareholders' agreement and consequently, not a party to arbitration proceedings. Learned counsel for the plaintiff contended that the requirements set out in the above-mentioned provision must necessarily apply only to parties to arbitration.

[39] From a plain reading of the above-mentioned provision, it would appear that the 'party' and 'parties' referred to in s. 10(1) above-mentioned are necessarily parties to arbitration. Thus, where parties have elected to resolve disputes by arbitration, rather than the courts, the courts on the premise of respect for party autonomy and a non-interventionist policy underlying the 2005 Act, will refer the parties to arbitration unless, "it finds that the agreement is null and void, inoperative or incapable of being performed."

[40] While it would seem that the above-mentioned provisions do not apply to persons who are non-parties to arbitration proceedings, it does not mean that the plaintiff, a non-party is at liberty to derail pending arbitration proceedings on the premise that the 2005 Act does not apply to him. To do so would allow a non-party to arbitration to circumvent and undermine the objective of the 2005 Act. In our view, where there are pending arbitration proceedings, as in this case, courts should have due regard to the 2005 Act and take cognizance of pending arbitration proceedings. To that extent, it is incorrect to say that the 2005 Act does not apply to the plaintiff.

[41] A similar stand was taken in the English case of *J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited case* [2007] EWHC 1262, where the court was faced with an application to restrain arbitration proceedings. Jackson J, in stipulating certain conditions to be met by such an application also emphasised that, "the court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based".

[42] The English Arbitration Act 1996, similar to our 2005 Act, had effected a significant shift in the law of arbitration in the underlying principles of both legislations: respect for party autonomy and self-restraint by the courts when intervening in the arbitral process. (See *J Jarvis & Sons Limited v. Blue Circle Dartford Estates Limited case* [2007] EWHC 1262).

[43] In the instant case, the learned High Court Judge had erred in not giving due consideration to the pending arbitration between the second, third and fourth defendants and the objective of the 2005 Act. The learned High Court Judge had erred in law in his finding that since the plaintiff was a non–party to arbitration, the 2005 Act does not apply to the plaintiff's application. The learned High Court Judge also made no finding on the nullity of the relevant agreement to justify the injunction to restrain arbitration proceedings.

Can A Non-party To Arbitration Restrain Arbitration Proceedings? The Applicable Test - Jarvis or Keet Gerald Francis?

[44] Can a non-party to arbitration restrain arbitration proceedings? The contention of learned counsel for the second defendant is that arbitration proceedings can only be restrained if the court finds that the plaintiff has satisfied the test set out in the case of *J Jarvis & Sons Limited v Blue Circle Dartford Estates Limited case* [2007] EWHC 1262 ('the *Jarvis* test').

[45] The *Jarvis* test for an injunction to restrain arbitration is set out at p. 9 para. 40 (per Jackson J) as follows:

> From this review of authority, I derive four propositions:
>
> (i) The Court's power under section 37 of the Supreme Court Act 1981 to grant injunctions includes a power to restrain an arbitration from proceeding.

(ii) That power may be exercised if two conditions are satisfied, namely; (a) the injunction does not cause injustice to the claimant in the arbitration, and (b) the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process.

(iii) The Court's discretion to grant such an injunction is now only exercised very sparingly and with due regard to the principles upon which the Arbitration Act 1996 is expressly based.

(iv) Delay by the party applying for an injunction is material to the Court's exercise of discretion and may in some cases be fatal to the application.

[46] The principles referred to in *Jarvis* were stated earlier by Sellars LJ in *The "Oranie" and The "Tunisie"* [1966] 1 Lloyd's Rep 477, 487.

[47] Thus, according to the *Jarvis* test above-mentioned, an injunction to restrain arbitration proceedings must be exercised sparingly, and with due regard to the principles of the English Arbitration Act 1996, (similar to our Act of 2005) and if the two conditions are satisfied: where, "the injunction does not cause injustice to the claimant in the arbitration, and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process." In addition, delay in the application for an injunction is a material factor. Pursuant to the above test, the application for an injunction to restrain arbitration proceedings in *Jarvis*'s case was dismissed.

[48] In urging this court to refer to the *Jarvis* test, learned counsel for the second defendant also referred us to the case of *Lin Ming v. Chen Shu Quan* [2012] 2 HKLRD 547, a decision of the Hong Kong High Court (at p. 561 paras. 45-46) and *Montgomery Watson NZ Limited v. Milburn NZ Limited* Cp 86/00 (per Young J) New Zealand High Court. Both Hong Kong and New Zealand are Model Law jurisdictions, while England is not. It was contended that the test applicable to the instant case and in Malaysia, should be in line with these jurisdictions on the premise the arbitration statutes of these jurisdictions like 2005 Act in Malaysia, is premised on the UNCITRAL Model Law on International Commercial Arbitration and drafted based on the New Zealand Arbitration Act 1996. (See *Dr Shamsul Bahar Abdul Kadir & Another Appeal v. RHB Bank Bhd* [2015] 4 CLJ 561, Federal Court at p. 593, *Law, Practice and Procedure of Arbitration*, 2nd edn, Sundra Rajoo).

[49] However, although England has not enacted the Model Law, English case law is still persuasive for two reasons. First the UK Arbitration Act 1996 was heavily influenced by the Model Law, both in its structure and content. Second, the stay provisions in s. 9 of the UK Arbitration Act 1996 mirrors the provision of s. 10(1) of our 2005 Act which requires the court to stay proceedings unless it is satisfied that the arbitration clause is null and void, inoperative or incapable of being performed. (See *Tomulugen Holdings Ltd And Another v. Silica Investors Ltd And Other Appeals* [2015] SGCA 57).

[50] According to the *Jarvis* test, inordinate delay is a material factor and can be fatal to an application for an injunction. It is not disputed that the plaintiff had filed the injunction to restrain arbitration proceedings almost ten months after he became aware of it. The second defendant had issued to the third and fourth defendants the notice to refer disputes to arbitration dated 19 October 2016. A copy of the said notice was extended to the plaintiff. The plaintiff only filed an application for an injunction to restrain arbitration proceedings on 29 August 2017. By this time parties in arbitration proceedings were conducting discovery of documents in preparation for the hearing scheduled to commence on 1 November 2017.

[51] There was no reasonable explanation provided by the plaintiff that would justify the delay of ten months. The learned High Court Judge, however, had appeared to give insufficient consideration to this issue, stating, "I accept the plaintiff's explanation that he had withheld any action to avoid aggravating the situation. It was only reasonable that the plaintiff would need some time to arrange and make a reasoned decision on the approach that he would need to take."

[52] In the case of *The "Oranie" and the "Tunisie"* [1966] 1 Lloyd's Rep 477, UK Court of Appeal at pp. 484-485 (per Sellars LJ) an application for an injunction to restrain an arbitration proceedings that had been fixed for hearing in less than a month's time was held to be fatal to the application:

> ... But the writ to stay these arbitration proceedings was no earlier than Nov. 19, 1965, in relation to a hearing which had been fixed after application of the parties, for Dec. 13, 1965. It is well established that delay is most prejudicial to the granting of an injunction. That ground alone, I think, would be sufficient to justify the refusal by the learned Judge to make the order asked for.

[53] Thus, in our view, the learned High Court Judge had erred in his finding that there was no inordinate delay by the plaintiff in his application for an injunction to restrain arbitration proceedings.

Multiplicity Of/Concurrent Proceedings

[54] The learned High Court Judge had also erred in his finding that the prospect of multiplicity of or concurrent proceedings is a sufficient reason to restrain arbitration proceedings. The learned judge had referred to the case of *Bina Jati* as authority for the position that other than fraud, the arbitrator's jurisdiction may be ousted where there is a prospect of multiplicity or concurrent proceedings that can give rise to inconsistent decisions. Alauddin JCA (as he then was) had stated as follows:

> The ousting of the arbitrator's jurisdiction is not limited to fraud alone but extends to:
>
> (a) The avoidance of multiplicity of suits;

(b) The allegations connected to the subject matter which affects parties who are outside the arbitration clause; and

(c) All issues ought to be tried by one tribunal.

[55] While it may have been the case prior to the 2005 Act that issues of multiplicity of suits and possibility of inconsistent findings between a decision of the court and that of an arbitrator may be material factors to oust the jurisdiction of an arbitrator, such factors are no longer material under the 2005 Act. The learned High Court Judge had erred in making the multiplicity of proceedings and the potential of inconsistent findings the primary reason to restrain arbitration proceedings. It is clear, however that *Bina Jati* which was decided when the 1952 Act was in force is no longer applicable as the 1952 Act has been repealed and replaced by the 2005 Act. Thus, the learned High Court Judge had clearly misdirected himself in referring to *Bina Jati* and the repealed 1996 Act to extend the jurisdiction of the High Court in matters which are the subject matter of arbitration.

[56] In *Jarvis*'s case, the prospect of concurrent proceedings and the consequences of inconsistent findings was held to be insufficient grounds to restrain arbitration proceedings. At p. 10 para. 47, it was held as follows:

> ... the prospect of concurrent proceedings in the present case, with all the usual consequences of concurrent proceedings, does not make the arbitration either vexatious or unconscionable or an abuse of process.

[57] It is noteworthy that *Jarvis* was decided in 2007 after the enactment of the English Arbitration Act 1996 which had effected a significant shift to arbitration and non-intervention by courts, a shift that is comparable to a shift in our legal landscape effected by our 2005 Act. Thus, the learned High Court Judge had erred in placing importance on the prospect of multiplicity of proceedings as a ground to restrain arbitration proceedings.

[58] Learned counsel for the plaintiff has rejected the *Jarvis* test on the grounds that the facts of *Jarvis*'s case can be distinguished from the instant case in that Jarvis was a party to arbitration while the plaintiff in the instant case is a non-party. Justice Jackson was however stating the general principles applicable for a court to grant an injunction to restrain arbitration proceedings. Nowhere was it stated that such principles are inapplicable to persons who are non-parties to arbitration proceedings. Nor should such a restrictive interpretation be inferred. We are of the considered view that the test in *Jarvis*'s case provides a useful guide to restrain arbitration proceedings in respect of an application by non-parties to arbitration proceedings.

The Keet Gerald Francis Test

[59] Thus, in our view the learned High Court Judge had erred in using the test in *Keet Gerald Francis* to determine whether the plaintiff's application for an injunction against arbitration had satisfied the requirements of the existence of serious issues to be tried, the adequacy of damages *in lieu* of an injunction and whether the balance of convenience favoured the plaintiff.

[60] The test referred to in *Keet Gerald Francis* is a general test for the granting of interim injunctions. It has no application on the facts and circumstances of this case which is the subject matter of arbitration proceedings and therefore subject to the clear and express provisions of the 2005 Act, in particular ss. 10(1), (3) and 8 above-mentioned.

[61] The *Keet Gerald Francis* (*supra*) test only applies as an interim measure to preserve the *status quo* between parties to a dispute pending the trial of the "serious issues" between the parties for a final and permanent resolution. Such a rationale has no application in the instant case where the parties in the arbitration proceedings are different from the parties in the suits before the court.

[62] Thus, the learned High Court Judge had erred in using the *Keet Gerald Francis* test instead of the *Jarvis* test in allowing the plaintiff's application to restrain arbitration proceedings. There was no evidence led to demonstrate the requirements of the *Jarvis* test: that the continuance of the arbitration would be "oppressive, vexatious, unconscionable or an abuse of process." Had the learned judge used the correct test, the plaintiff's application would have been found to have fallen far short of the requirements set out in *Jarvis*'s case and thereby ought to have been dismissed.

Should The Test To Restrain Arbitration Proceedings Be Less Stringent As Against Non-parties To Arbitration Proceedings Than As Against Persons Who Are Parties To Arbitration Proceedings?

[63] Learned counsel for the plaintiff is of the view that there is no legal impediment for a person who is not a party to arbitration to restrain arbitration proceedings. Learned counsel for the plaintiff went further to propose that the threshold requirements for an injunction to restrain arbitration proceedings should be lower for a non-party to arbitration proceedings than for a person who is a party to the arbitration proceedings, on the basis that the latter is contractually bound to abide by the arbitration agreement, whereas a non-party is not bound as such.

[64] We are in total agreement with learned counsel for the plaintiff that where parties have entered into an agreement to refer disputes to arbitration, they are contractually bound to abide by such agreement and courts will give

effect to such agreement. This position was succinctly expressed by Edgar Joseph JR SCJ in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; [1994] 2 AMR 1232 at p. 728 (CLJ); p. 1250 (MLJ) when His Lordship observed:

> ... the approach of the courts will be that those who make a contract to arbitrate their disputes, should be held to their bargains …

Consistent with the above stand pursuant to s. 10(1) of the 2005 Act, courts are bound to refer parties to arbitration "unless it finds that the agreement is null and void, inoperative or incapable of being performed". Be that as it may, the contractual duty of parties to arbitration to abide by the arbitration contract should not be a basis to impose by comparison a lower threshold on persons who are not parties to any arbitration agreement and therefore not contractually bound.

[65] We are not persuaded by the above-mentioned argument for the following reasons. There cannot be a 'higher' threshold for a party to arbitration, and a 'lower' threshold for a non-party to arbitration. To accede to the above proposition would lead to the absurd position that it would be easier for a non-party to arbitration proceedings to obtain an injunction to restrain arbitration proceedings than a party to arbitration proceedings would!

[66] For the sake of argument, even if two sets of threshold tests to injunct arbitration proceedings is accepted, there would be more reason for the higher threshold to be applied to a non-party to arbitration proceedings since the fact of the matter is that as a non-party, he is not a participant to any arbitration proceedings and therefore any award by an arbitrator would not bind him. If a 'stranger' to an arbitration agreement is allowed easily to restrain arbitration proceedings, the rationale and objective of the 2005 Act will be seriously undermined by those who are non-parties to arbitration.

[67] In our view, parties to arbitration are undoubtedly subject to the requirements stipulated by s. 10(1) and (3) of the 2005 Act in matters which are the subject matter of arbitration. Parties to arbitration agreement are contractually bound to submit to arbitration and in line with respect for party autonomy and the non-interventionist policy of the courts pursuant to the 2005 Act, courts would lean in favour of arbitration proceedings.

[68] As for persons who are not parties to arbitration and are not bound by any award of the arbitrator, on the authority of *Jarvis*, any discretion to grant injunctions against arbitration must be exercised sparingly and with due regard to any pending arbitration and the objective and principles of the 2005 Act. In addition thereto, the application must satisfy the two conditions stipulated in that, "the injunction does not cause injustice to the claimant in

A the arbitration, and the continuance of the arbitration would be oppressive, vexatious, unconscionable or an abuse of process." In this sense, a non-party to arbitration would have to satisfy a higher threshold to merit an injunction to arbitration proceedings than that required of a party to arbitration pursuant to s. 10(1) of the 2005 Act as discussed above.

B

[69] We are in agreement with learned counsel for the second defendant that the *Keet Gerald Francis* test used by the learned High Court Judge was the wrong test. We are minded to agree with learned counsel for the second defendant that the correct test is that set out in *Jarvis*. On the facts of the case, we do not find that the arbitration would cause injustice to the claimant or

C that the continuance of the arbitration would be "oppressive, vexatious, unconscionable or an abuse of process." In addition, the plaintiff is guilty of inordinate delay in making the injunction application almost ten months after he was made aware of arbitration proceedings.

D **[70]** In conclusion, the learned High Court Judge was plainly in error in his decision to allow the plaintiff's application to restrain pending arbitration proceedings between the second, third and fourth defendants. Based on the reasons above, we are unanimous in allowing this appeal with costs. The decision of the learned High Court Judge is set aside.

E

F

G

H

I